

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

**Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 1920/Ahd/2016
Assessment Year 2010-11**

The DCIT, Circle-1(3), Baroda (Appellant)	Vs	Fine Line Circuit Company, Plot No. E-8, GIDC, Manjusar, Savli, Vadodara-391770 PAN: AAFF6253A (Respondent)
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**Revenue by: Shri S.K. Dev, Sr. D.R.
Assessee by: Shri Sanket Bakshi, A.R.**

Date of hearing : 28-11-2018
Date of pronouncement : 30-11-2018

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This revenue appeal for A.Y. 2010-11, arises from order of the CIT(A)-5, Vadodara dated 25-04-2016, in proceedings under section 271(1)(c) of the Income Tax Act, 1961; in short the Act.

2. The solitary ground of appeal of the revenue is against the decision of Id. CIT(A) in deleting the penalty of Rs. 69,72,735/- levied u/s. 271(1)(c) of the act against the wrong claim of deduction u/s. 10B of the act.

3. The fact in brief is that assessee has filed return of income declaring income of Rs. 60,83,540/- on 25th Sep, 2010. Subsequently, the case was

selected under scrutiny by issuing of notice u/s. 143(2) of the act on 24th August, 2011. On scrutiny, the assessing officer has noticed that assessee has claimed exemption u/s. 10B to the amount of Rs. 2,71,63,864/-. On verification, the assessing officer has observed that as per annexure A of form 56G the export turnover considered for deduction u/s. 10B included Rs. 2,13,73,473/- which was made to another SEZ/EOU by treating the same as deemed export. On query, the assessee has explained that during the year under consideration, it has made export sale including deemed export made to other units which have been set up in SEZ and stated that the deduction u/s. 10B were admissible if all the conditions mentioned in section 10B(2) of the act was satisfied by the assessee. It was further stated that there was no such conditions prescribed under this section requiring the assessee to satisfies realization of consideration of export in foreign currency only. It was stated that assessee satisfies all the conditions for claiming the deduction u/s. 10B in respect of deeded export. The assessing officer has not accepted the explanation of the assessee and stated that assessee has not received an amount of Rs. 2,13,73,473/- in convertible foreign exchange as required u/s.10B(3) of the act. Therefore, the assessing officer has arrived at the conclusion that sale of Rs. 2,13,73,473/- made within India and not received in convertible foreign exchange was not eligible for exemption u/s. 10B of the act. The Id. CIT(A) has confirmed the addition made by the assessing officer and dismissed the appeal of the assessee. Thereafter, during penalty proceedings the assessing officer has issued show cause notice dated 2nd March, 2015 to the assessee to explain why not penalty u/s. 271(1)(c) should not be levied. The assessee has explained that there was reduction in deduction u/s. 10B by an amount Rs. 45,99,586/- on account of disallowance of deduction u/s. 10B of deemed export sale of Rs. 21373473/- and on similar issue the penalty initiated in assessment year 2005-06 was dropped by the assessing officer. It was also submitted that the claim was duly supported with certificate of chartered accountant. It was clearly disclosed that the claim of deduction u/s. 10B of the act was based on deemed sale. Because of difference of opinion the

penalty u/s. 271(1)(c) should not be levied. The assessing officer has not accepted explanation of the assessee and stated that assessee has concealed/filed inaccurate particulars of income within the meaning of section 271(1)(c) of the act therefore levied penalty of Rs. 69,72,735/-.

4. Assessee preferred appeal before the Id. CIT(A). The Id. CIT(A) has deleted the penalty levied by the assessing officer. The relevant part of the decision of the Id. CIT(A) is reproduced as under:-

"5.3 I have considered the facts and the circumstances of the case, the observations of the Assessing Officer, material available on the record and the judicial pronouncements on the subject. In this case, the only addition which was subjected to the operation of the provisions of section 271(1)(c) of the Act was on account of disallowance of deduction of Rs.2,13,73,473/- u/s 10B of the Act on account of the fact that the assessee had not received sales proceeds of Rs.2,13,73,473/- in convertible foreign exchange, as required u/s 10B(3), therefore, he was not eligible for deduction u/s 10B of the Act.

*5.4 Penalty proceeding can be initiated on two charges i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. If proceedings are initiated on charge of concealment then penalty cannot be levied on the charge of furnishing of inaccurate particulars of income and vice versa (**CIT-v- Lakhdhirlalji 85 ITR 77 (Guj.)**). Thus, there must be a clear finding about the charge of penalty. It is incumbent upon the AO to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such finding, the order would be bad in law - **Manu Engg. Works 122 ITR 306 (Guj.)**, **New Sorathia Engg. Co. 282 ITR, 642 (Guj)**, **Padma Ram Bharali 110 ITR 54 (Gau)**. Thus, basis of satisfaction cannot be altered subsequently by IAC - **CIT v. Kejriwal Iron Stores 168 ITR 715 (Raj)**.*

5.5 At this stage, it is necessary to understand the distinction between the two charges on the basis of which penalty can be levied i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. It is the particulars of income which is the common subject matter of both the charges which will be discussed later. The word 'conceal' as per Webster's Dictionary means "to hide, withdraw, or remove from observation, cover or keep from sight; to keep secret; to avoid disclosing or divulging. That means nondisclosure of particulars of income. On the other hand, where particulars are disclosed but such disclosure is not correct, true or accurate, it would amount to furnishing of inaccurate particulars of income. For example, in case of businessman, if a particular transaction of sale is not shown in the books, it would amount to concealment of particulars of income while is shown but at a lesser value, it would amount to furnishing of inaccurate particulars of income.

*5.6 It is pertinent to note that thrust of the legislature is upon the particulars of income which are either concealed or furnished inaccurately by the assessee. Therefore, one must understand the meaning of the words "particulars of income". Recently, the Income-tax Tribunal had to consider the meaning of the expression "furnishing of inaccurate particulars of income" appearing in section 271(1)(c) in the case of **Kanbay Software India (P) Ltd. 122 TTJ 721 (Pune)**. It was held that the expression 'particular' refers to facts, details, specifics or the information about someone or something. Thus, the details or information about the income would deal with factual details of income and cannot be extended to areas which are subjective such as status of the taxability of an income, admissibility of a deduction and interpretation of law. Accordingly, it was held that mere*

rejection of assess's legal claim would not amount to furnishing of inaccurate particulars of income. This view is now fortified by the recent Supreme Court Judgment in the case of **Reliance Petroproducts 322 ITR 158 SC**. In this case, the claim of assessee u/s. 36(1)(iii) was rejected by the Assessing Officer and the order of Assessing Officer was upheld by the Tribunal. As a result, penalty u/s 271(1)(c) was imposed on account of furnishing of inaccurate particulars of income. The penalty was held to be illegally imposed by the Tribunal since factual details of income furnished by the assessee were found to be correct. The matter ultimately reached the SC and the Hon'ble court upheld the view of the tribunal by holding that "mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the assessee.."

5.7 Explanation 1 to section 271(1)(c) cannot be applied where charge against the assessee is furnishing of inaccurate particulars of income, since it provides a deeming fiction qua concealment of particulars of income only and consequently cannot be extended to a case where charge against the assessee is furnishing of inaccurate particulars of income. On the other hand, where charge against the assessee is concealment of particulars of income, the Assessing Officer has to establish either that assessee has not disclosed the particulars of income under the main provisions or the case of assessee falls within the scope of the deeming fictions created under the Explanations. For example, the assessee might not disclose particular sales or dividend income or income from any source. Such instances would fall under the main provisions itself. In such cases, the burden is on the Assessing Officer to establish the existence of the charge on the basis of material on record.

5.8 Explanation 1 creates a legal fiction and raises a presumption against the assessee. It provides that if in respect of any fact which is material to the computation of total income, assessee (i) does not offer an explanation or offers an explanation which is found to be false by the Assessing Officer, or (ii) offers an explanation which, he is not able to substantiate and fails to prove that such explanation is bona-fide and that all material facts have been disclosed, then, the amount added or disallowed shall be deemed to be income in respect of which particulars are concealed. It is pertinent to note that this explanation is restricted to a case where assessee is unable to offer an explanation or is unable to substantiate the explanation offered by him in respect of factual detail of the income. Therefore, even this Explanation does not and cannot apply to a case where addition/disallowance has been made by mere rejection of legal claim made by Assessing Officer. This view has also been taken by Pune Bench of the Tribunal in the case **Kanbay Software** (supra). Therefore bona fide of legal claim is not the subject matter of the Explanation 1. In my view, the ratio of the apex court, in the case of **Reliance Petroproducts** (supra), to the effect that mere rejection of legal claim would not invite the penalty would also apply where the charge against the assessee is concealment of particulars of income.

5.9 It is also noted that a similar issue arose in the case of the assessee in A.Y. 2008-09, where penalty u/s 271(1)(c) was levied by the Assessing Officer on a similar disallowance of claim u/s 10B. The assessee's appeal before CIT(A) against the order u/s 271(1)(c) was allowed by CIT(A) in favour of the assessee vide his decision dated 20.06.2014 in CAB/11-06/13-14. Similarly, CIT(A)-II, Baroda has also decided the issue of penalty on disallowance of deduction u/s 10B of the Act on account of deemed export u/s 10B in favour of the assessee in A.Y. 2004-05 vide decision dated 18.06.2010 in CAB/I-605/08-'09. The Assessing Officer has himself dropped the penalty u/s 271(1)(c) on a similar disallowance in the case of the assessee himself in A.Y. 2005-06.

5.10 In view of the above discussion, it is clear that this is neither a case of concealment nor of furnishing of inaccurate particulars, since the disallowance and consequent addition were on account of disallowance of a legal claim made by the assessee and in view of the decision of Hon'ble Supreme Court in **Reliance Petroproducts** (supra) and the

decisions of CIT(A)-II, Baroda in the case of the assessee in A.Y. 2004-05 and 2008-09 and the fact that the Assessing Officer has himself dropped the penalty u/s 271(1)(c) in the case of the assessee in A.Y. 2005-06, on a similar disallowance, penalty u/s 271(1)(c) of the Act cannot be levied in this case. Consequently, the penalty of Rs.69,72,735/- levied u/s 271(1)(c) of the Act is deleted. The assessee succeeds on this ground of appeal."

5. During the course of appellate proceedings before us, the Id. departmental representative has supported the order of assessing officer. Ld. counsel has supported the order of Id. CIT(A) and contended that the assessing officer has inaccurately levied penalty to the amount of Rs. 69,72,735/- whereas the total disallowance of deduction in the case of the assessee was made to the amount of Rs. 4598379/- .If the penalty is levied @ 100% it comes to Rs. 13,79,514/- which is less than Rs.20 lac according to CBDT Instructions bearing No. 3 of 2018 under file No.F.No.279/Misc.142/2007-ITJ(Pt). Even on merit he has stated that assessee has furnished the full particulars of income and there was only difference of opinion on the basis of which penalty cannot be levied.

6. We have heard the rival contentions and perused the material on record carefully. During the year under consideration, the assessee has claimed deduction of Rs. 2,71,63,864/-. However, the assessing officer has partly disallowed the claim of deduction u/s. 10B in respect of sale which was not received in convertible foreign exchange as required u/s. 10B(3) of the act as against the total claim of deduction of Rs. 2,71,63,864/-. The assessing officer has restricted the claim u/s. 10B at Rs. 2,25,65,485/-. It is noticed that assessing officer had inadvertently levied penalty on an amount of Rs. 2,25,65,485/- whereas the difference of disallowance of deduction was to the amount of Rs. 45,98,379/-. The total penalty would have come to the amount of Rs. 15,62,989/- , therefore, considering the correct penalty amount tax effect in this case will be less than 20 lacs. On 11.7.2018 the CBDT has issued Instructions bearing No. 3 of 2018 under file No.F.No.279/Misc.142/2007-ITJ(Pt) prohibiting its subordinate authorities from filing of the appeal to the Tribunal against the order of the CIT(A) where the tax effect by virtue of the relief given by the CIT(A) is less than Rs.20

lakhs. The instructions have been made applicable with retrospective effect, meaning thereby, these instructions are applicable on pending appeals also. In the present case, %tax effect+ on the total income assessed minus the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issue against which appeal is filed, is less than Rs.20 lakhs. Further, the case of the Revenue does not fall within the ambit of exceptions provided in the Circular. Thus, keeping in view the above CBDT circular and provisions of section 268A of the Income Tax Act, we are of the view that the present appeal of the Revenue deserves to be dismissed. It is accordingly dismissed.

7. In addition to it on merit also, the assessee has clearly disclosed all the particulars in respect of their claim of deduction u/s. 10B of the act of deemed sale vide note no. 1 r.w. para 18 of form no. 56G. After considering this disclosure the assessing officer has disallowed the deduction u/s. 10B on deemed sale. It is very clear in the light of the above facts and circumstances that there was difference of opinion with regard to the claim of the assessee of availability of deduction u/s 10B on deemed export and assessee has not furnished any inaccurate particulars of income. In view of these facts we do not find any error in the decision of Id. CIT(A) that there was no merit in levying penalty u/s. 271(1)(c) of the act. Therefore, the appeal of the revenue is dismissed.

8. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 30-11-2018

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER
Ahmedabad : Dated 30/11/2018

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क० तालम अ० षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलालय आधिकरण,
अहमदाबाद